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No. 92-1398

In The

Supreme Court of the United States

October Term, 1993

IN RE: GREENE, RICHARD D. & DONNA J.
husband and wife – Debtors

ROSS RICHARDSON, Chapter 7 Panel Trustee,

Petitioner,

vs.

MT. ADAMS FURNITURE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF OF ROSS RICHARDSON, CHAPTER 7 PANEL TRUSTEE, PETITIONER

Ross P. Richardson
Henningsen, Vucurovich & Richardson, P.C.
116 West Granite Street
P.O. Box 399
Butte, Montana 59703
(406) 723-3219

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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This Brief is submitted in response to the Solicitor General's Brief as Amicus Curiae, which expresses the views of the United States.

STATEMENT

Petitioner generally agrees with the statement of the case set forth by the Solicitor General of the United States (hereinafter "Solicitor General"). However, in the appeal to the United States Court of Appeals for the Ninth Circuit, the Petitioner herein never raised the issue of tribal sovereign immunity by analogy to the restrictive scope of foreign sovereign immunity embodied in the *Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 et sec.* This analogy was drawn by Circuit Judge Reimer in her concurring opinion, which opinion clearly points out the need for Certiorari in this case. The reasoning as set forth in Petitioner's original brief serves as a basis for dispensing with Tribal immunity.

DISCUSSION

In both the Brief of the Solicitor General and Respondent Mt. Adams Furniture (hereinafter "Mt. Adams"), it is asserted that this case presents a "narrow issue" for the Court to decide. To the contrary, as Judge Reimer's concurring opinion to the Ninth Circuit opinion pointed out, the issue decided by the Ninth Circuit completely throws open the door of tribal sovereign immunity in the context of commercial activities and extends that immunity to Indian Nations engaged in interstate commerce. Moreover, as the Brief of the Solicitor General accurately points out, the decision conflicts with numerous decisions of this Court, other Federal Courts and State Courts of last resort.

The Solicitor General notes that the Ninth Circuit opinion below relied upon the *United States v. Nordic Village, Inc.*, 112 S.Ct. 1011 (1992), for the proposition that sovereign immunity of the Indian tribe is not affected by the Bankruptcy Code, since 11 U.S.C. Section 106 of the Code does not waive sovereign immunity. The reliance on *Nordic Village*, however, is misplaced. The decision in *Nordic Village* is limited to the

specific facts which involved the United States government, which is by definition a "governmental unit". Section 106 states:

> (a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.
>
> (b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.
>
> (c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity –
>
> > (1) a provision of this title that contains "creditor", "entity", or "governemntal unit" applies to governmental units; and
> >
> > (2) a determination by the court of an issue arising under such a provision binds governmental units.

In the opening Brief of the Appellant, Mt. Adams Furniture Company, to the United States Court of Appeals for the Ninth Circuit, Mt. Adams discussed Section 106 and stated:

> This statute waives sovereign immunity to an extent for "governmental units". The question then becomes did congress intend Indian tribes to be included as a "governmental unit" in the waiver of sovereign immunity statute found at 11 U.S.C. Section 106.
>
> The term "governmental unit" is defined by the Bankruptcy Code at 11 U.S.C. Section 101(26). This definition reads as follows:
>
> > "(26) 'Governmental Unit' means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States

> (but not a United States Trustee while serving as trustee in a case under this title); a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government;"

It is readily apparent that Indian tribes were not included within the definition of governmental unit. The Yakima Nation has found nothing in the legislative history of the Bankruptcy Code and amendments thereto which would suggest Congress intended Indian tribes to fall within the definition for "governmental unit". *Opening Brief of Appellant Mt. Adams Furniture to the United States Ninth Circuit Court,* page 13.

Further, Mt. Adams goes on to state:

> Indian tribes are not contained in the definition of "governmental unit" found at 11 U.S.C. Section 101(26). It bears repeating that there is no indication in the legislative history for the Bankruptcy Code and amendments thereto which would unequivocally show Congress intended Indian tribes were to be included within the definition for "governmental unit". . . . *Opening Brief of Mt. Adams Furniture to the United States Ninth Circuit Court,* page 14.

Nordic Village is clear and limited in its application. State and federal sovereigns which are specifically enumerated under 11 U.S.C. Section 101(26) (now [27]), are to be treated the same for immunity purposes. The same is not true of Indian Nations. Moreover, as pointed out in Trustee's original brief, the Bankruptcy Code does apply to the tribe because of the "dependent status" of the Indian Nation. In *F.P.C. v. Tuscarora,* 362 U.S. 99, 80 S.Ct. 543, 4 L.Ed.2d 584 (1960), this Court held that a general statute which by its terms applies to all persons includes Indians and their property interests. See also *Donovan v. Coeur d'Alene Tribal Farm,* 751 F.2d 1113, 1115-16 (9th Cir. 1985). The Bankruptcy Code is a general statute which does apply to Indians.

IMMUNITY AS DETERMINED BY THE UNITED STATES SUPREME COURT

The Solicitor General points out that this Court has recognized limits on tribal authority by virtue of the Indian tribe's dependent status within the federal system. These decisions are not inapposite, but have a direct bearing on the matter before this Court. The Solicitor General relies primarily on decisions of this Court for the proposition that the Ninth Circuit's decision in this case is appropriate. However, as shown hereafter, all of these decisions support the granting of Certiorari in this case.

In *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991), the Solicitor General found solace in the statement that "suits against Indian tribes are . . . barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation". *Id.*, at 509. The *Potawatomi* decision, however, actually limited Indian sovereign immunity.

The question before the *Potawatomi* Court dealt with the imposition of Oklahoma's state cigarette tax on the sales of those cigarettes, which occurred in stores *which were located on Indian land*. The Court decided that under the doctrine of Tribal Sovereign Immunity, the state could not tax sales to Indians, but it did remain free to collect taxes on sales to non-members of the tribe. Of importance to this case is the fact that the lands on which the stores were operated were "held by the Federal Government in trust for the benefit of the Potawatomis", thus qualifying as a *reservation* for tribal immunity purposes. 498 U.S., at 511. The decision, therefore, does not stand for the argument the Solicitor General makes.

Although the activity complained of was clearly *on reservation*, the Court nonetheless found a waiver of immunity for sales occurring to non-Indians. As Justice Stevens' concurring opinion notes, this holding rejects the tribe's argument of complete immunity from legal process. Justice Stevens stated:

> The doctrine of sovereign immunity is founded upon an anachronistic fiction. See *Nevada v. Hall*, 440 U.S. 410, 414-416 (1979). In my opinion all

> Governments – federal, state, and tribal – should generally be accountable for their illegal conduct. The rule that an Indian tribe is immune from an action for damages absent its consent is, however, an established part of our law. See *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-513 (1940). *Nevertheless, I am not sure that the rule of tribal sovereign immunity extends to cases arising from a tribe's conduct of commercial activity outside its own territory, . . .* (Emphasis supplied).

Also relied upon by the Solicitor General was Language from this Court's decision in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978):

> Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. 436 U.S., at 58.

In *Santa Clara Pueblo* petitioners sought declaratory and injunctive relief against the Indian tribe in Federal Court concerning a tribal ordinance which denied membership in the tribe to offspring of certain female tribal members. It was an internal matter concerning tribal members and a matter of very great importance to the individuals. Plaintiffs had access to their own elected officials and their tribal machinery to settle the problem. It was strictly an internal problem with no non-Indians involved.

The basis for the suit was an alleged violation of Title I of the Indian Civil Rights Act of 1968, 25 U.S.C. Section 1301-1303. This Court found that the Act did not authorize this type of an action in the Federal Courts. It should be noted that the activity dealt with in this case was not involved in the stream of commerce off of the tribal lands. Thus, this case does not stand for the proposition that Indian immunity has been extended to "off-reservation commercial activity". This case was also clearly distinguished by the Tenth Circuit in *Dry Creek Lodge, Inc. v. Arapaho and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), cert. denied, 449 U.S. 1118 (1981), which is discussed hereafter.

Puyallup Tribe v. Washington Dept. of Game, 433 U.S. 165 (1977), is relied on by the Solicitor General for the proposition that immunity also extends to off-reservation activity. Again, the facts of *Puyallup* clearly indicate that this Court did not so extend the immunity doctrine. Here, the State of Washington attempted to regulate fishing activities of the tribe by imposing state conservation laws promulgated by the Washington State Department of Game. The tribe claimed sovereign immunity and this court found that the state could not exercise jurisdiction over the tribe itself with respect to the lawsuit. Again, the facts of this case dealt with an attempt by the State of Washington to exercise jurisdiction over Indian activity which took place *on the reservation*. This decision cannot be extended any further. there is no distinction between on-reservation activity versus off-reservation activity in this case.

Specifically, the state court placed a limit on the number of steelhead fish which all members of the tribe could catch with nets, and directed the tribe to identify members engaged in the steelhead fishing industry and to report the number of fish they caught each week. 433 U.S., at 172. It was to this order that the tribe claimed, and received, immunity. This Court specifically noted that the State could regulate the fishing of individual tribesmen on or off the reservation.

Finally, Justice Blackmun's concurring opinion points out the difficulty with the doctrine of Indian immunity in this day and age when he states:

> I join the Court's opinion. I entertain doubts, however, about the continuing vitality in this day of the doctrine of tribal immunity as it was enunciated in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940). I am of the view that the doctrine may well merit re-examination in an appropriate case. 433 U.S., at 178-179.

Puyallup did not extend tribal immunity to off-reservation activity involving interstate commerce.

Although the Solicitor General only referred to *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), by footnote, this decision is completely contrary to the result reached

by the Ninth Circuit. In *Mescalero*, this Court held that a tribal ski resort, which was located on land leased from the federal government and not on Indian lands, was liable to pay to the state a non-discriminatory gross receipts tax. *Mescalero* clearly holds that Tribal Immunity will be strictly limited to "on-reservation" activities. This Court noted:

> But tribal activities conducted outside the reservation present different considerations. Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the state. 411 U.S., at 148-149.

This Court refused to apply a blanket tribal immunity to all Indian activity and concluded that the tribe's ski resort (not "individual Indians" as claimed by the Solicitor General), which was off tribal lands, was subject to the state's gross receipts tax.

The same analogy exists in the present case. The all-encompassing Bankruptcy Code clearly applies to Indian activity which is off of tribal lands. Under the rationale applied in *Mescalero*, the Tribe would be subject to the Bankruptcy Code.

FEDERAL COURT DECISIONS

Contrary to the assertions of the Solicitor General, the federal court decisions previously cited to this Court by the Trustee are directly on point. The full context of the citation noted by the trustee in *North Dakota – Montana Wheat Growers' Ass'n v. United States*, 66 F.2d 573 (8th Cir. 1933), cert. denied, 291 U.S. 672 (1934), states as follows:

> It is true that courts have drawn distinctions between the action of the government in what is termed its "sovereign capacity" and its operations in commercial transactions generally carried on by corporations organized by the government and invested with some of the sovereign functions. *Id*, at 578.

Although the Eighth Circuit eventually held that immunity applied to a counterclaim against the Federal Farm Board, by the aforementioned language it did impliedly concede that a government is not immune from suit where it organizes and operates a business operation.

The most glaring conflict between the decision below is found in the Tenth Circuit's decision in *Dry Creek Lodge, Inc. v. Arapaho and Shoshone Tribes, (supra)*. In fact, the Solicitor General openly concedes that this case is "plainly inconsistent with *Santa Clara Pueblo*, which held that suits against a tribe under the ICRA are barred by sovereign immunity,. . . . " solicitor General's Brief, page 15. As before-noted, *Santa Clara Pueblo* is one of the seminal cases relied upon by the Solicitor General in his Amicus Brief to this Court.

Dry Creek Lodge was decided in light of *Santa Clara Pueblo*, and the Eighth Circuit specifically distinguished the cases. Instead of discussing the Indian Civil Rights Act of 1968, the Eighth Circuit dispensed with the tribal claim of immunity by noting:

> The reason for the limitations and the references to tribal immunity also disappear when the issue relates to a matter outside of internal tribal affairs and when it concerns an issue with a non-Indian. 623 F.2d, at 685.

The Solicitor General argues that the basis for the *Dry Creek Lodge* decision is the premise that "there ha[d] to be a forum where the dispute can be settled". 623 F.2d, at 685. This assumption, however, fails to include the fact that the Eighth Circuit also found that since the activity did not involve internal tribal affairs, and involved a non-Indian, tribal immunity disappears. There is no question but that if the facts of this case were presented to the Eighth Circuit, the tribe's immunity would be limited and the Bankruptcy Court would have jurisdiction to decide the matter. In *Dry Creek Lodge* we have a federal court applying federal law (ICRA) with an assertion by the Indian tribe of immunity. Even in light of the often-quoted language of *Santa Clara Pueblo*, this court found that Indian tribal immunity did not apply for the

aforementioned reasons. It is directly on point and it is the only such case that has been presented to this Court.

STATE COURT DECISIONS

Again, contrary to the assertions of the Solicitor General, the state cases cited by the Trustee provide further evidence of the conflicts which have arisen in decisions involving Indian tribal immunity. In *Padilla v. Pueblo of Acoma,* 754 P.2d 845 (N.M. 1988), cert. denied, 490 U.S. 1029 (1989), the New Mexico Supreme Court was faced with a state law breach of contract claim against a tribal business for work performed *off of the reservation.* The *Padilla* court offered an extensive, well-reasoned approach to the law surrounding Indian tribal immunity. After reviewing the "Supreme Law of the Land" the New Mexico Court could find no provision which prohibited a state's exercise of jurisdiction over sovereign Indian tribes for off-reservation conduct. Consequently, the Court held that the exercise of jurisdiction in this case was appropriate. 754 P.2d, at 850.

As before-noted, there is no case that has been presented either by Mt. Adams or the Solicitor General that provides that an Indian tribe is granted the same immunity as the federal government possesses under the Bankruptcy Code. To the contrary, as has been noted above, this Court has made clear that a general statute applies to all persons and includes Indians and their property interests. *F.P.C. v. Tuscarora,* (*supra*); *Donovan v. Coeur d'Alene Tribal Farm,* (*supra*). Moreover, the *Dry Creek Lodge,* (*supra*), rationale would specifically mandate that Bankruptcy Court be the forum wherein this matter is decided. In like manner, under the reasoning of *Padilla,* the Bankruptcy Court would have jurisdiction to hear this matter.

This court refused an application by the Indian tribe in *Padilla* to review the New Mexico court's decision. However, Justice White dissented from that denial and urged this Court to hear the case "to resolve the conflict among the state courts". 490 U.S., at 1030.

In addition, *Dixon v. Picopa Const. Co.*, 772 P.2d 1104, (Ariz. 1989), also supports the trustee's position that tribal sovereign immunity does not protect a corporation organized under tribal law, for acts it engages in off of tribal lands. The Solicitor General's argument notwithstanding, *Dixon* also supports the Trustee's position that Indian immunity is limited when the activity that is the basis for legal action is off the reservation.

CONCLUSION

There are at least three (3) United States Supreme Court decisions, two (2) Federal Court decisions and two (2) State Court decisions which have limited tribal immunity when the circumstances involve activities off the Indian lands and in the trade of commerce. The decision from the Ninth Circuit below clearly conflicts with the results reached in the aforementioned cases. Although the Solicitor General's brief asserts that this Court should not grant Certiorari in this case, it does clearly point out what Justice Reimer's concurring opinion stated. The question as to whether or not tribal sovereign immunity extends to commercial activities is an important, complex and unresolved question. Neither Mt. Adams nor the Solicitor General has provided to this Court any case on point which directly provides that the Bankruptcy Code does not apply to activities involving Indian Nations which are off of tribal lands and involved directly in interstate commerce. The Solicitor General's brief evolves into a critique of every court decision cited by the Petitioner. The arguments are wide ranging and far afield in an effort to show that the decisions are "inapposite" to the Ninth Circuit's ruling. The only conclusion that can be reached from these legal arguments is that this Court must act and resolve the conflict.

DONE AND DATED this 30th day of December, 1993.

Respectfully submitted,

Ross Richardson
U.S. Bankruptcy Trustee
P.O. Box 399
Butte, MT 59703